A **JAIDEEP SINGH DALIP SINGH v. ASP MAHATHIR ABDULLAH SAPAWI & ORS**

FEDERAL COURT, PUTRAJAYA
MD RAUS SHARIF PCA
HASAN LAH FCJ
B ZAINUN ALI FCJ
AZAHAR MOHAMED FCJ
AZIAH ALI FCJ
[CRIMINAL APPEALS NO: A-05-252-10-2016,
A-05-253-10-2016, A-05-254-10-2016 & A-05-255-10-2016]
C 31 MAY 2017

***CRIMINAL PROCEDURE:*** *Habeas corpus – Application for – Unlawful detention – Allegation of – Remand orders issued by Magistrate under s. 4(1)(a) of Prevention of Crime Act 1959 ('POCA') – Preliminary objection raised – Proper mode of*
D *proceeding to mount challenge on unlawful detention – Whether ought to be by way of appeal or by revision of High Court – Whether writ of habeas corpus right mode of proceeding to challenge legality of detention – Whether cases of State Government of Negeri Sembilan & Ors v. Muhammad Juzaili and Madjai Sanusi v. Pengarah Imigresen Negeri Johor applicable – Competency of detaining authority*
E *– Whether powers under POCA synonymous with Magistrate executing powers under Subordinate Courts Act 1948 – Whether habeas corpus application ought to have been heard on its merit by High Court*

***ADMINISTRATIVE LAW:*** *Remedies – Habeas corpus – Application for – Unlawful detention – Allegation of – Remand orders issued by Magistrate under*
F *s.4(1)(a) of Prevention of Crime Act 1959 ('POCA') – Preliminary objection raised – Proper mode of proceeding to mount challenge on unlawful detention – Whether ought to be by way of appeal or by revision of High Court – Whether writ of habeas corpus right mode of proceeding to challenge legality of detention – Whether cases of State Government of Negeri Sembilan & Ors v. Muhammad Juzaili and Madjai*
G *Sanusi v. Pengarah Imigresen Negeri Johor applicable – Competency of detaining authority – Whether powers under POCA synonymous with Magistrate executing powers under Subordinate Courts Act 1948 – Whether habeas corpus application ought to have been heard on its merit by High Court*

The appellants had been detained for 21 days pursuant to remand orders
H separately issued by a Magistrate under s. 4(1)(a) of the Prevention of Crime Act 1959 ('POCA'). The respective remand orders were then extended under s. 4(2)(ii) of the POCA for an additional 38 days. The appellants each filed a separate writ of *habeas corpus* at the High Court, for them to be brought to court and released immediately. At the hearing of the appellants'
I applications, the Senior Federal Counsel ('SFC') representing the respondents raised a preliminary objection on points of law on the ground that the applications for *habeas corpus* adopted by the appellants were not the

proper mode of proceeding to mount a challenge on their alleged unlawful detention. The SFC argued that the proper mode should be by way of an appeal or to seek a revision by the High Court against the remand orders granted by the Magistrate. The Judicial Commissioner ('JC') allowed the preliminary objection and dismissed the appellants' applications for writ of *habeas corpus*. The JC was of the view that the appellants was in fact challenging the legality or constitutionality of s. 4 of the POCA which could not be done as the determination on the legality of any statute could only be done by the Federal Court under art. 4(3) and 4(4) of the Federal Constitution. In support of that view, the JC cited the decision in the case of *State Government of Negeri Sembilan & Ors v. Muhammad Juzaili Mohd Khamis & Ors* ('*Muhammad Juzaili*'). It was further held by the JC that the appellants could not avail themselves of an order of *habeas corpus* because the remand order was made by a Magistrate and any challenges to such an order should be made by way of an appeal or a revision and cited the case of *Madjai Sanusi v. Pengarah Imigresen Negeri Johor & Ors* ('*Madjai*'). Hence, this appeal.

**Held (allowing appeals)**
**Per Md Raus Sharif PCA delivering the judgment of the court:**

**(1)** In the case of *Muhammad Juzaili*, the purported challenge was as to whether the State Government of Negeri Sembilan had the power to enact s. 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992. It was held that such challenge could not be by way of judicial review but must be by way of the specific procedure as provided in arts. 4(3) and (4) of the Federal Constitution. However, the factual situation in the present case was different, whereby the appellants' complaint had nothing to do with the competency of Parliament to legislate the POCA. The complaint was more to the effect that the POCA was unconstitutional for lack of compliance with art. 151 of the Federal Constitution, therefore the case of *Muhammad Juzaili* had no application to the present case. (paras 12 & 13)

**(2)** The JC erred when she upheld the submission of the SFC that the appellants could not avail themselves to an order of *habeas corpus* because the order was made by a Magistrate. The principles established in the case of *Madjai* was not applicable in this present case. The remand order herein was made by the Magistrate pursuant to s. 4(1)(a) and 4(2)(ii) of the POCA. In doing so, the Magistrate was not exercising his judicial power but rather a power of a detaining authority duly given under the POCA, an Act which provides for preventive detention. Under preventive detention law, the orders for remand as in s. 4 of the POCA are preconditions to what will develop into preventive detention orders. (paras 14-18)

**(3)** The proper mode for the appellants to seek redress has to be by way of *habeas corpus*. This was because the appellants were being detained under the preventive detention law which was promulgated pursuant to art. 149 of the Federal Constitution. A distinction must be drawn between preventive detention and punitive detention in order to appreciate the nature of remedy which becomes available as a consequence. Thus, in cases involving orders under s. 4 of the POCA, writ of *habeas corpus* was the right mode of proceeding to mount a challenge on the legality of the detention. The JC, in allowing the preliminary objection raised by the SFC and holding that the prerogative writ of *habeas corpus* was not the proper mode of proceeding to mount a challenge on the appellants' alleged unlawful detention, was clearly wrong in law. (paras 20 & 21)

**(4)** Where a challenge is made to the competence of the detaining authority to detain a person for want of the requisite powers to do so, such a challenge could be made by way of an application for a writ of *habeas corpus*. This was what happened in the present case. The appellants were challenging the competency of the detaining authority, who happened to be a Magistrate vested with the powers under the POCA. Such powers under the POCA was not synonymous with the Magistrate executing his powers under the Subordinate Courts Act 1948. Thus, the orders of the JC in upholding the preliminary objection raised by the SFC were set aside. The appellants' *habeas corpus* applications should have been heard on its merit by the High Court. (paras 27 & 28)

***Bahasa Malaysia** Headnotes*

Perayu-perayu ditahan selama 21 hari menurut perintah tahanan yang dikeluarkan secara berasingan oleh Majistret bawah s. 4(1)(a) Akta Pencegahan Jenayah 1959 ('APJ'). Perintah tahanan masing-masing kemudiannya dilanjutkan bawah s. 4(2)(ii) APJ untuk tambahan 38 hari. Perayu-perayu masing-masing memfailkan writ *habeas corpus* yang berasingan di Mahkamah Tinggi, untuk mereka dibawa ke mahkamah dan dilepaskan serta merta. Semasa perbicaraan perayu-perayu, Peguam Kanan Persekutuan ('PKP') yang mewakili responden-responden membangkitkan bantahan awalan atas hal perkara undang-undang dengan alasan permohonan *habeas corpus* perayu-perayu bukan cara prosiding yang betul bagi membantah penahanan yang didakwa melanggar undang-undang. PKP menghujahkan bahawa cara yang sesuai adalah melalui rayuan atau semakan oleh Mahkamah Tinggi terhadap perintah tahanan yang diberikan Majistret. Pesuruhjaya Kehakiman ('PK') membenarkan bantahan awalan tersebut dan menolak permohonan writ *habeas corpus* perayu-perayu. Pesuruhjaya Kehakiman berpendapat bantahan perayu-perayu terhadap kesahihan atau keperlembagaan s. 4 APJ tidak boleh dibenarkan kerana penentuan kesahihan apa-apa statut hanya boleh dilaksanakan oleh Mahkamah

Persekutuan bawah per. 4(3) dan 4(4) Perlembagaan Persekutuan. Untuk menyokong pandangan tersebut, PK memetik keputusan dalam kes *State Government of Negeri Sembilan & Ors v. Muhammad Juzaili Mohd Khamis & Ors* ('*Muhammad Juzaili*'). PK seterusnya memutuskan perayu-perayu tidak boleh memanfaatkan perintah *habeas corpus* kerana perintah tahanan dibuat oleh Majistret dan apa-apa bantahan terhadap perintah sebegitu harus dibuat melalui rayuan atau semakan dan merujuk pada kes *Madjai Sanusi v. Pengarah Imigresen Negeri Johor & Ors.* ('*Madjai*'). Oleh itu, rayuan ini.

**Diputuskan (membenarkan rayuan-rayuan)**
**Oleh Md Raus Sharif PMR menyampaikan penghakiman mahkamah:**

**(1)** Dalam kes *Muhammad Juzaili*, bantahan adalah sama ada Kerajaan Negeri Sembilan mempunyai kuasa menggubal s. 66 Enakmen Jenayah (Negeri Sembilan) 1992. Diputuskan bahawa cabaran sebegitu tidak boleh dilaksanakan melalui semakan kehakiman tetapi melalui prosedur spesifik seperti yang diperuntukkan dalam per. 4(3) dan (4) Perlembagaan Persekutuan. Walau bagaimanapun, fakta dalam kes ini berbeza kerana aduan perayu-perayu tiada kaitan dengan kompetensi Parlimen untuk menggubalkan APJ. Aduan adalah bahawa APJ tidak berperlembagaan kerana tidak mematuhi per. 151 Perlembagaan Persekutuan, oleh itu kes *Muhammad Juzaili* tidak diguna pakai dalam kes ini.

**(2)** PK terkhilaf apabila memutuskan hujahan PKP bahawa perayu-perayu tidak dapat memanfaatkan perintah *habeas corpus* kerana perintah dibuat oleh Majistret. Prinsip-prinsip yang dibuktikan dalam kes *Madjai* tidak diguna pakai dalam kes ini. Perintah tahanan dibuat oleh Majistret menurut s. 4(1)(a) dan 4(ii) APJ. Dengan berbuat demikian, Majistret tidak melaksanakan kuasa kehakimannya tetapi sebaliknya kuasa pihak berkuasa penahanan yang diberikan oleh APJ, satu Akta yang memperuntukkan tahanan pencegahan. Bawah undang-undang tahanan pencegahan, perintah-perintah tahanan seperti bawah s. 4 APJ adalah prasyarat untuk apa yang akan membentuk menjadi perintah tahanan pencegahan.

**(3)** Cara yang betul untuk perayu-perayu menuntut ganti rugi adalah melalui *habeas corpus*. Ini kerana perayu-perayu ditahan bawah undang-undang tahanan pencegahan yang diisytiharkan menurut per. 149 Perlembagaan Persekutuan. Pembezaan harus dilakukan antara tahanan pencegahan dan tahanan punitif supaya dapat menghargai sifat remedi yang tersedia sebagai akibatnya. Oleh itu, dalam kes-kes yang melibatkan perintah-perintah bawah s. 4 APJ, writ *habeas corpus* adalah cara prosiding yang betul untuk mencabar kesahan penahanan. Pesuruhjaya Kehakiman, dalam membenarkan bantahan awalan yang dibangkitkan oleh PKP dan

memutuskan bahawa hak writ *habeas corpus* bukan cara prosiding yang betul untuk mencabar penahanan perayu-perayu yang didakwa melanggar undang-undang, dengan jelasnya adalah salah dari segi undang-undang.

**(4)** Di mana cabaran dibuat terhadap kecekapan pihak berkuasa penahanan untuk menahan seseorang disebabkan keperluan memberi kuasa berbuat demikian, cabaran sebegitu boleh dibuat melalui permohonan writ *habeas corpus*. Ini yang berlaku dalam kes ini. Perayu-perayu mencabar kompetensi pihak berkuasa penahanan, iaitu Majistret yang diberikan kuasa bawah APJ. Kuasa sebegitu bawah APJ tidak sinonim dengan Majistret yang melaksanakan kuasa-kuasanya bawah Akta Mahkamah Rendah 1948. Oleh itu, perintah-perintah PK dalam menegakkan bantahan awal yang dibangkitkan oleh PKP diketepikan. Permohonan *habeas corpus* perayu-perayu harus didengar berdasarkan merit di Mahkamah Tinggi.

**Case(s) referred to:**

*Inspector-General of Police & Anor v. Lee Kim Hoong [1979] 1 LNS 34 FC* ***(refd)***

*Madjai Sanusi v. Pengarah lmigresen Negeri Johor & Ors [1999] 7 CLJ 569 HC* ***(refd)***

*Re Datuk James Wong Kim Min; Minister Of Home Affairs, Malaysia & Ors v. Datuk James Wong Kim Min [1976] 1 LNS 129 FC* ***(refd)***

*Sazali Mat Noh v. Timbalan Menteri Dalam Negeri, Malaysia [1998] 4 CLJ 460 HC* ***(refd)***

*State Government of Negeri Sembilan & Ors v. Muhammad Juzaili Mohd Khamis & Ors [2015] 8 CLJ 975 FC* ***(refd)***

**Legislation referred to:**

Courts of Judicature Act 1964, s. 35

Criminal Procedure Code, ss. 307, 368

Drug Dependants (Treatment and Rehabilitation) Act 1983, s. 6(1)(a)

Emergency (Public Order and Prevention of Crime) Ordinance 5 1969, s. 3

Federal Constitution, arts. 4(3), (4), 5(1), (4), 8(2), 9(2), 10(1)(a), (2), 149, 151

Prevention of Crime Act 1959, ss. 2(a)(ii), 4(1)(a), (3), (4)

Syariah Criminal (Negeri Sembilan) Enactment 1992, s. 66

*For the appellants - Gobind Singh Deo, S Prakash, Haijan Omar & Joanne Chua Tsu Fae; M/s Gobind Singh & Co*

*For the respondent - Mohammad Al-Saifi Hj Hashim & Muhammad Sinti; SFCs*

*[Editor's note: Appeal from High Court, Ipoh; Criminal Application No: 44-54-09-2016, 44-55-09-2016, 44-53-09-2016 & 44-52-09-2016 (overruled).]*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Md Raus Sharif PCA:**

**[1]** On 14 September 2016, the appellants each filed a separate writ of *habeas corpus* supported by their respective affidavits at the High Court, for them to be brought to court and be released immediately.

**[2]** The appellants had earlier been detained for 21 days pursuant to remand orders separately issued by a Magistrate, under s. 4(1)(a) of the Prevention of Crime Act 1959 (POCA). The respective remand orders were later extended under s. 4(2)(a)(ii) of the POCA for an additional 38 days.

**[3]** At the hearing of the appellants' applications for writ of *habeas corpus* before the High Court, the learned Senior Federal Counsel (SFC) representing the respondents raised a preliminary objection on points of law on the ground that the applications for *habeas corpus* adopted by the appellants were not the proper mode of proceeding to mount a challenge on their alleged unlawful detention. The SFC argued that the proper mode should be by way of an appeal or to seek a revision by the High Court against the remand orders granted by the learned Magistrate.

**[4]** The learned Judicial Commissioner (JC) allowed the preliminary objection raised by the SFC. The appellants' applications for writ of *habeas corpus* were accordingly dismissed.

**[5]** The learned JC was of the view that the appellants in their respective applications for *habeas corpus* was in fact challenging the legality or constitutionality of s. 4 of the POCA. This according to the learned JC cannot be done as the determination on the legality of any statue can only be done by the Federal Court under art. 4(3) and 4(4) of the Federal Constitution. In support of that view, the learned JC cited the decision of this Court in *State Government of Negeri Sembilan & Ors v. Muhammad Juzaili Mohd Khamis & Ors* [2015] 8 CLJ 975 (*Muhammad Juzaili*).

**[6]** The learned JC further held that the appellants could not avail themselves of an order of *habeas corpus* because the remand order was made by a Magistrate and any challenges to such an order should be made by way of an appeal or a revision. In support, the learned JC cited the case of *Madjai Sanusi v. Pengarah lmigresen Negeri Johor & Ors* [1999] 7 CLJ 569.

**[7]** Before this court, counsel for the appellants submitted that the learned JC fell into error in holding that the decision of this court in *Muhammad Juzaili* was applicable and binding on her. In that case, the respondents (Muhamad Juzaili Mohd Khamis, Shukur Jani and Wan Fairol Wan Ismail) had sought to challenge the validity and constitutionality of s. 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992 (s. 66), and to that end had applied to the High Court by way of judicial review for declarations to that effect. The application was dismissed by the High Court.

**[8]** However on appeal, the Court of Appeal upon noting that the respondents were Muslim males suffering from Gender Identity Disorder, and that s. 66 had indeed criminalised any Muslim male who sported a woman's attire or posed as a woman in public place, ruled that s. 66 had

directly affected the respondents, and more, had offended their fundamental liberties as guaranteed by arts. 5(1), 8(2), 9(2), 10(1)(a) and 10(2) of the Federal Constitution. The Court of Appeal held that s. 66, in so transgressing the respondents' fundamental rights, was unreasonable in nature and purport, thereby rendering it invalid and unconstitutional.

**[9]** Before this court the State Government of Negeri Sembilan & Ors (appellants), after having obtained leave to appeal, raised the following preliminary issue, namely, that, since the respondents were challenging the validity or constitutionality of s. 66 on grounds that the State Legislature of Negeri Sembilan had no power to enact that provision, the respondents were duty bound to comply with the specific procedure as laid down in cls. (3) and (4) of art. 4 of the Federal Constitution. Since the respondents had not done so, and had instead initiated the challenge by way of judicial review in the High Court, the application in the High Court was rendered incompetent in law with the result that both the High Court and the Court of Appeal had committed a jurisdictional error when they decided to entertain the application and the appeal thereon.

**[10]** The respondents argued, in response, that they were not questioning the legislative power of the State Legislature, that their application for judicial review did not fall within the ambit of cls. (3) and (4) of art. 4 of the Federal Constitution, and that the Federal Court, in any case, ought to hear the case on merit as the application had not in any way prejudiced the appellants.

**[11]** This court agreed with the appellants. This court held that the issue was not whether the appellants were prejudiced by the mode of action undertaken by the respondents. The case involved a larger issue. It was about the jurisdiction of the courts. The fundamental question was whether the validity or constitutionality of s. 66 could be challenged in the High Court by way of a collateral attack in a judicial review proceeding. This court held that it cannot be done.

**[12]** It can be seen that the case of *Muhammad Juzaili* dealt with completely different set of facts. In that case the purport challenge was as to whether or not the State Government of Negeri Sembilan had the power to enact s. 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992. The issue was whether the challenge can be made by way of judicial review instead of by way of the specific procedure as specified art. 4(3) and (4) of the Federal Constitution. It was held that such challenge cannot be by way of judicial review but must be by way of the specific procedure as provided by art. 4(3) and (4) of the Federal Constitution.

**[13]** However, the factual situation in the present case is quite different. In the present case, the appellants' complaint had nothing to do with the competency of Parliament to legislate the POCA. The complaint was more to the effect that the POCA was unconstitutional for lack of compliance with art. 151 of the Federal Constitution. Clearly, the case of *Muhammad Juzaili* has no application to the present case.

**[14]** We are also of the view that the learned JC had further erred when she upheld the submission of the learned SFC that the appellants could not avail themselves to an order of *habeas corpus*, because the order was made by a Magistrate. As stated earlier the case of *Madjai Sanusi v. Pengarah lmigresen Negeri Johor & Ors* [1999] 7 CLJ 569 (*Madjai Sanusi*) was cited as the authority for the proposition.

**[15]** In *Madjai Sanusi*, the applicant (Madjai) was charged on four charges under the Immigration Act 1959 in the Magistrate's Court. Madjai sought for release from custody under warrant of remand imposed by the Magistrate by way of a writ of *habeas corpus*. The respondents raised a preliminary objection that the remedy of the writ of *habeas corpus* was not a suitable remedy in the circumstances of the case. In upholding the preliminary objection, the High Court Judge held that the remedies available to Madjai in the circumstances of the case were: (i) an appeal under s. 307 of the Criminal Procedure Code, and (ii) a revision under s. 323 of the Criminal Procedure Code and under the general supervisory and revisionary jurisdiction of the High Court under s. 35 of the Courts of Judicature Act 1964. Abdul Malik Ishak J (as he then was) explained:

> ... *Habeas corpus* will not issue if the arrested person is facing an execution of a sentence passed by a court of law – legally competent to do so. If the trial court had legal jurisdiction to hear and sentence the arrested person, the only remedy left is by way of appeal or by way of revision and no *habeas corpus* can be issued in such cases (*Janardhan v. State of Hyderabad*, AIR [1951] SC 217). If the accused is properly remanded by a magistrate having jurisdiction, the writ of *habeas corpus* will not lie (*Jagannath Misra v. State of Orissa* AIR [1969] Ori 296).

**[16]** His Lordship further explained:

> ... To succeed in an application for a writ of *habeas corpus*, the applicant must show to this court that he is "illegally or improperly detained". In my judgment, a person cannot be said to be "illegally or improperly detained" when that person is serving a jail sentence that has been lawfully passed by a court of competent jurisdiction (*Re Gurdit Singh* [1933] MLJ 224; *Re Gurbachan Singh's Application* [1967] 1 MLJ 74; *Re Datuk Harun Haji Idris* [1981] 1 MLJ 47; and *Datuk Harun Haji Idris v. Officer-In-Charge, Pudu Prison* [1981] 2 MLJ 72 FC) and I may add, in the context of the present case, where the applicant is detained in custody under a warrant of remand lawfully passed by the magistrate of Johor Bahru – a court of competent jurisdiction, he cannot be said to be "illegally or improperly detained."

**[17]** We are in complete agreement with the reasons alluded to by Abdul Malik Ishak J (as he then was). The question now is whether the principle established in that case is applicable in this present case. With respect, we do not think so. In the present case, as stated earlier the remand order was made by the Magistrate pursuant to s. 4(1)(a) and 4(2)(ii) of the POCA. In doing so, the Magistrate was not exercising his judicial power but rather a power of a detaining authority duly given under the POCA. The POCA is an Act which provides for preventive detention.

**[18]** Under preventive detention law, the orders for remand as in s. 4 of the POCA are precondition to what will develop into preventive detention orders. Thus, there is a need to distinguish between an order made by a Magistrate under preventive detention laws and the ordinary order of punitive detention. The distinction between the powers of a Magistrate in preventive detention *vis-a-vis* the ordinary order of punitive detention was clearly explained by KC Vohrah J (as he then was) in *Sazali Mat Noh v. Timbalan Menteri Dalam Negeri, Malaysia* [1998] 4 CLJ 460; [1999] 1 MLJ 9, where His Lordship observed:

> It will be noticed that the power in s. 6 is not vested in just anybody but a magistrate, a person trained to be careful with procedures which are provided by Jaw and which need to be meticulously observed. To be noted, however, is that the power is not vested in a court of Jaw and the enquiry officer, the magistrate, is not synonymous with a magistrates' court under the Subordinate Courts Act 1948; the power given to the magistrate in the capacity of an enquiry officer under s. 6(1)(a) of the 1983 Act is not found in any provision or any schedule of the Subordinate Courts Act 1948.

**[19]** In that case, KC Vohrah J (as he then was) was dealing with s. 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983. In that case, the applicant was ordered by a Magistrate to reside at a rehabilitation center for two years. The applicant applied for an order of *habeas corpus* for his release on the ground that certain mandatory procedures under the Drugs Dependants (Treatment and Rehabilitation) Act 1983 were not observed by the Magistrate before the order was made. The respondents objected to the application of *habeas corpus* on the ground that the proper application should be by way of *certiorari* to review the decision of the Magistrate. KC Vohrah J (as he then was) rejected the respondent's argument and held that *habeas corpus* was the proper mode for the applicant to seek redress on the alleged irregularities which adversely curtails the applicant's personal liberty.

**[20]** We agree with the views of KC Vohrah J (as he then was) in the said case. Similarly, in the present case, the proper mode for the appellants to seek redress, has to be by way of *habeas corpus*. This is because the appellants were being detained under the preventive detention law which was

promulgated pursuant to art. 149 of the Federal Constitution. In fact, the Federal Court in *Re Datuk James Wong Kim Min* [1976] 1 LNS 129; [1976] 2 MLJ 245, had explained the distinction between preventive and punitive detentions. Lee Hun Hoe CJ (Borneo) said:

> Preventive detention is the detention of a person without trial as opposed to punitive detention where a person is detained after a trial in a court of law in which he is proved to have committed an offence punishable under certain provisions of the Penal Law.

**[21]** The observation made above is clear in that a distinction must be drawn between both kinds of detention order to appreciate the nature of remedy which becomes available as a consequence. Thus, in cases involving orders under s. 4 of the POCA, the writ of *habeas corpus* is the right mode of proceeding to mount a challenge on the legality of the detention. As such, the learned JC in allowing the preliminary objection raised by the SFC and holding that the prerogative writ of *habeas corpus* was not the proper mode of proceeding to mount a challenge on the appellants' alleged unlawful detention, was clearly wrong in law.

**[22]** This type of situation is not new. There is a plethora of authorities on this issue. To cite one example is the case of *Inspector-General of Police & Anor v. Lee Kim Hoong* [1979] 2 MLJ 291. In that case, the applicant (Lee) heard that the police were looking for him. His solicitor then took him to Jalan Bandar Police Station on 16 February 1979 at 3pm. At the station, Inspector Idris said that the police wanted Lee for questioning. The solicitor left Lee at the station but returned at 5.30pm to enquire about Lee. At 7.30pm he was told that Lee was being detained in police custody. On the following day, Lee was not produced before a Magistrate as required by art. 5(4) of the Federal Constitution.

**[23]** On 19 February 1979, when there was still no news of Lee, the solicitor wrote a letter to the Chief Police Officer of the Federal Territory indicating that he was commencing a *habeas corpus* proceedings and requested for a copy of the warrant under which Lee was being detained in compliance with s. 368 of the Criminal Procedure Code. He also made a request to interview Lee to take a statement from him. When there was still no news of Lee or reply to the February 19 letter, the solicitor filed a writ of *habeas corpus* on 26 February 1979 for the immediate release of Lee.

**[24]** According to the respondents, Lee was arrested on 16 February 1979 under s. 3 of the Emergency (Public Order and Prevention of Crime) Ordinance 5, 1969 (hereinafter referred to as the 1969 Ordinance). As enquiries could not be completed within 24 hours of arrest, Inspector Idris Ayob authorised his further detention for an additional period of 24 hours with effect from 5.40pm on 17 February 1979.

**[25]** In his application, it was argued that his detention was illegal and/or unlawful as the statutory provision of which he was allegedly detained had no force of law. The application was heard on February 28 when it transpired that the applicant had been detained by the police under s. 3(3) of the 1969 Ordinance. The learned High Court Judge held that the applicant was being detained under a law which no longer exists and therefore his detention was unlawful. The learned trial judge ordered for his immediate release. In deciding as he did Harun J (as he then was) had this to say:

> The respondents have not stated whether the applicant is being detained under section 3(1) or section 3(2) of the 1969 Ordinance. The difference is important to a detained person because if it is under section 3(1) then he may be detained by the Minister for up to two years whereas if it is under section 3(2) then at worst he may be detained for not more than 60 days.
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> To exercise its powers under section 3 of the 1969 Ordinance, the police must have known on February 16, 1979 the grounds for arresting and detaining the applicant. It is clear from the wording of the section that the police must have this knowledge before the arrest since under section 3(2) there must be failure to satisfy grounds (i) or (ii); or suspicion of ground (iii); or reason to believe grounds (iv) or (v) or grounds (i), (ii) or (iii) of section 3(1). There is no question of arresting a person first under this section and after enquiries to determine if possible the particular grounds of his arrest and subsequent detention. The purpose of the enquiry is merely to confirm or otherwise the reasons for the belief or suspicion or the failure to give a satisfactory explanation required by the police.
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> Article 5(3) of the Federal Constitution reads:
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> > Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.
>
> In applying this constitutional provision to an arrest under section 3 of the 1969 Ordinance, there is no reason why Lee could not have been informed of the grounds of his arrest on February 16, 1969. Now this is precisely the information which his solicitor was seeking on February 16, 1979 and for the next ten days before instituting these proceedings. Even now the applicant, his solicitor and family still do not know. I should make it clear that the police are not being called upon to disclose the evidence which Jed to the arrest and detention but merely the grounds of arrest. All the Police have to say, for example, is that "Lee was arrested because we have reason to believe that it is necessary for the prevention of crimes involving violence."
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> I realise the police have a difficult duty to perform to maintain the public peace and security. They should by all means exercise their powers under the law but in exercising these extra-ordinary powers of detention without trial, they should be careful not to raise in the minds of the public any suspicion of tyranny. They cannot avoid such suspicion if a man is detained by them for days without any reason being given. I think, this failure to communicate is the real complaint in this application.

On the evidence before me, I am satisfied, that the detention of the applicant is in accordance with section 3 of the 1969 Ordinance. However, it is contended by the applicant that the 1969 Ordinance has ceased to remain in force for the following reasons:

(i) It was enacted by the Yang di-Pertuan Agong on May 16, 1969 under Article 150(2) of the Federal Constitution.

(ii) Parliament sat on February 20, 1971.

(iii) The Ordinance has not been laid before Parliament as required by Article 150(3) of the Federal Constitution.

(iv) The Ordinance is not saved by the Emergency (Essential Powers) Act, 1979.

Taking the last point first, I hold that the 1979 Act did not save the 1969 Ordinance as the Act only dealt with Ordinances and Regulations made on or after February 20, 1971 which is not the case here. Now the object of Article 150(3) is for the Yang di- Pertuan Agong to give an account, as it were, to Parliament of all things done by him during their absence. It seems to me that the requirement that Ordinances promulgated during an emergency by the Yang di-Pertuan Agong shall be laid before both Houses of Parliament is a mandatory one and the effect of noncompliance is that the Ordinance will cease to have effect afer Parliament had sat. The learned Deputy Public Prosecutor concedes that the 1969 Ordinance was not laid before Parliament. In the event, I am compelled to hold that the Emergency (Pμblic Order and Prevention of Crime) Ordinance, 1969 has ceased to have effect.

I accordingly find that the applicant is being detained under a law which no longer exists and therefore his detention is unlawful and order his immediate release.

**[26]** The Federal Court in allowing the appeal said:

... we allowed additional evidence to be adduced, which evidence consisted of an affidavit by Encik Ghazali bin Haji Abdul Hamid, Assistant Secretary to Parliament. Encik Mohamed Noor, counsel for the appellants, referred us to Standing Order 19(3) of the Senate and to Standing Order 20(3) of the lower House which provide that the presentation of all papers shall be entered in the Votes and Proceedings of the day on which they are presented. Thus Votes and Proceedings are a kind of minutes. Next we were referred to the Votes and Proceedings of each House, and the Votes and Proceedings of the Senate for February 20, 1971, showed that the Ordinance was laid before that House that day (see page 3, item 6) and those of the lower House for February 24, 1971, that it was laid before that House that day (see page 30, item 6).

Thus it is clear, in our judgment, that the Ordinance has been properly laid before both House as is required by the Constitution and it therefore has the force of law.

A We refused Mr. K. Pasupathy leave to cross-examine Encik Ghazali on his affidavit. He said he wanted to ask Encik Ghazali what happened after a paper had been laid before Parliament. We did not think this evidence is relevant. In any event, Article 3(1) of the Constitution provides:

> The validity of any proceedings in either House of Parliament or any committee thereof shall not be questioned in any court.

B This means that if records kept by Parliament show that a paper had been laid, that is conclusive as for as the courts are concerned.

As the Ordinance has the force of law, the detention of the applicant was therefore lawful and the learned judge was in error in ordering his release. C We therefore allowed the appeal and set-aside the learned judge's order.

**[27]** It can be seen from above case that where a challenge is made to the competence of the detaining authority to detain a person for want of the requisite powers to do so, such a challenge can be made by way of an application for a writ of *habeas corpus.* This was what happened in the present D case. The appellants were challenging the competency of the detaining authority, who happened to be a Magistrate which was vested with the powers under the POCA. Such powers under the POCA is not synonymous with the Magistrate executing his powers under the Subordinate Court Act 1948.

E **[28]** Accordingly, we allow the appeals. We set aside the orders of the learned JC in upholding the preliminary objection raised by the SFC. The appellants' *habeas corpus* applications should have been heard on its merit by the High Court.

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